distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for any one to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only — and, indeed, were it not for the decision in Reddaway's Case (1896) A.C. 199, I should say this should be made altogether impossible.

It is true the question in issue in cases of this class may generally be broadly stated as: Did the defendants by their representations seek to induce purchasers to acquire their goods under the false belief that these goods were or the plaintiffs' manufacture? If it can be shewn that representations to the effect that the goods were manufactured by the plaintiffs be made directly or by implication, by the language used, the plaintiffs would of course be entitled to a remedy. But where the plaintiffs' proof shews that the only representation by the defendants consists in the use of a term or terms which aptly and correctly describe the goods offered for sale, as in the present case, it must be a condition of the plaintiffs' success that they shall prove that these terms no longer mean what they say — or no longer mean only what they say — but have acquired the secondary and further meaning that the particular goods are goods made by the plaintiffs, and, as I have already indicated, it is in my view difficult to conceive cases in which the facts will come up to this. Unless that be proved, there is no room for a charge of violation of any right, or indeed of a charge of fraud — for the defendants are only exercising the right which they possess as much as the plaintiffs do, and which every one has, to employ words in ordinary use which are an apt and proper description of the goods for sale.

The Lord Ordinary has made this observation in his judgment: 'I do not myself remember a case in which the use of a merely descriptive name has been interdicted as deceptive, unless in circumstances which truly involved fraud on the part of the user.' The appellants' counsel were unable, though invited by me, to cite any case that runs counter to that observation, which I believe to be sound. In the case of Reddaway it was held there was fraud. The person who sold the goods (the camel-hair belting) had expressly said that he would be enabled by using that term to sell his goods as the goods of the plaintiffs, and if the term 'camel-hair belting' had really come to mean the plaintiffs' belting in the trade and with the public, and the defendant knew this, that was a case of fraud. In the case of Reddaway, I understand it was held that the words had acquired the secondary meaning alleged, and that the defendant's knowledge of this was important evidence on that point."

In the present case, according to Mr. Watt's affidavit, the plaintiff company sold a very large quantity of essence of chicken in Malaya, the total amount realised during the period from 1957 to the 31st December 1960 being approximately $2,914,000. It is to be noted that this amount represents the total proceeds of sales in the whole of Malaya; there is no evidence to show how much was realised as the result of sales in Singapore.

The plaintiff company have in their advertising campaign advertised their essence of chicken in connection with the words APOLLO or APOLLO BRAND and the three Chinese characters. These advertisements have been both visual, in the Press, on hoardings and in display media, and oral, in Rediffusion broadcasts in the Chinese language and by Chinese-speaking sales-girls who go from door to door.

In his affidavit Mr. Watt claims that the plaintiff company's mark has become well known to the public. On the other hand, Mr. Teo Thuang Hai in his affidavit denies that the plaintiff company have acquired any reputation in the three Chinese characters used by them or that the characters have become distinctive of the plaintiff company or their goods. Considering the evidence as a whole, including the evidence relating to the advertising campaign, and bearing in mind that the plaintiff company's essence of chicken has been sold in Malaya for only a few years, and that there is no evidence as to the actual or even approximate quantity of essence of chicken sold in Singapore, I am not satisfied that the plaintiff company have discharged the onus which lies on them of proving that the three Chinese characters used by them have acquired the secondary meaning that the particular goods are goods imported by the plaintiff company.

There are no allegations of fraud in the statement of claim and counsel for the plaintiff company has not relied on fraud in the course of his argument. In this connection I need only repeat the following observation made by the Lord Ordinary in *Cellular Clothing Co., Ltd.* v. *Maxton & Murray, supra*, an observation which Lord Shand said he believed to be sound:—

"I do not myself remember a case in which the use of a merely descriptive name has been interdicted as deceptive, unless in circumstances which truly involved fraud on the part of the user."

In the result the motion must be dismissed. The costs will be the defendants' costs in the action.

Motion dismissed.

Solicitors: *Drew & Napier; Braddell Bros.*

OVERSEA CHINESE BANKING CORPN. LTD. v. EASTERN AUTO CO. LTD.

[O.C.J. (Wee Chong Jin J.) October 17, 1960]

[Singapore — Suit No. 886 of 1954]

Landlord and Tenant — Possession under section 15(1)(g) of Rent Control Ordinance (Cap. 242) — Defences of waiver and estoppel.

The plaintiffs purchased certain premises in 1951 and at the date of purchase the defendants were tenants on a monthly tenancy. No written tenancy agreement was made and consequently the defendants were not precluded from sub-letting.

The defendants made numerous sub-lettings and some time prior to July 1953 the plaintiffs' agents investigated to see whether or not defendants were charging rents in respect of these sub-tenancies over and above the percentage permitted under section 15(1)(g) of the Control of Rent Ordinance with a view to commencing proceedings for recovery of possession if excess rents were in fact being charged. The investigations of the agents were unsuccessful in establishing the true position. The plaintiffs then wrote to the defendants in July 1953 asking for particulars of sub-letting and these were supplied by the defendants. Subsequently, the plaintiffs learned that besides the tenancies on which information had been supplied by the defendants, there were seven others. The plaintiffs then terminated the tenancy on April 30, 1954 by a notice to quit dated March 29, 1954.

It was argued for the defendants that even assuming that rent in excess of that permitted under section 15(1)(g) was received by them, the plaintiffs: (i) had waived the conditions of section 15(1)(g) and/or acquiesced in the defendants' acceptance of rents in excess of the authorised percentage and were therefore precluded from recovering possession under this section; (ii) were, by their conduct, estopped from relying upon the provisions of section 15(1)(g).

Held: (1)(a) waiver as operative in cases of tenancies is confined to cases of acceptance of rent after knowledge of a breach of covenant or an obligation of the tenancy and in such instances it is held to be a waiver of the breach or obligation. The breach here was not of a tenancy agreement but of a statutory provision. In such cases, the acceptance of rent with knowledge of the statutory breach could amount to an affirmation of the contractual tenancy but it could not amount to a waiver of the right to invoke jurisdiction of the Court for an order for possession under the statutory provision; (b) as this was a continuing breach acceptance of rent could only bind the plaintiffs up to the date of that acceptance. By virtue of the Apportionment Ordinance (Cap. 21) rents at the same rate were accruable from day to day and a fresh breach was occasioned by the rent due from May 1 to May 10, 1954 though it was not payable until the end of the calendar month; (c) it was not proved that plaintiffs knew that the defendants had received rents from their sub-tenants to an extent as to bring them indisputably within section 15(1)(g) and therefore plaintiffs did not have the requisite knowledge for a case of waiver;

(2) as to the defence of estoppel, as defendants had admitted that up to the date of the notice to quit they believed their position to be safe on the ground that they had not exceeded the limit imposed by section 15(1)(g), the conduct of the plaintiffs could not have induced them to alter their position to their detriment and this defence must therefore fail.

Cases referred to:—

(1) *Welch* v. *Nagy* [1950] 1 K.B. 455.

(2) *Solle* v. *Butcher* [1950] 1 K.B. 672.

CLAIM FOR POSSESSION.

R. H. Green (*K. C. Chan* with him) for the plaintiffs.

K. A. Seth (*C. H. Koh* with him) for the defendants.

Wee Chong Jin J.: The plaintiffs who are the owners of the premises ordinarily known as Town Subdivision XX Resurvey Lots 89-6, 89-2, 89-5, 89-4 together with buildings erected thereon and known as Nos. 61/79 Orchard Road and Nos. 24/28 Penang Road Singapore claim possession of the said premises from the defendants who hold these premises as monthly tenants of the plaintiffs.

The claim for possession is based on section 15(1)(g) of the Control of Rent Ordinance 1953 (Cap. 242) which provides as follows:—

"15.—(1) In the case of all premises such an order or judgment as is referred to in section 14 of this Ordinance may be made in any of the following cases, namely:—

. . . . (g) where the tenant having sublet the premises or part thereof receives in respect of such subletting, rents (excluding any municipal services paid by the tenant) for any sublet part of the premises in excess of the recoverable rent for that part, or rents which exceed in the aggregate one hundred and ten per centum of the recoverable rent paid by the tenant himself including the apportioned rental or value of any part of the premises retained by the tenant or not sublet by him;"

During the course of the trial it is admitted by the defendants that the defendants have exceeded the limit imposed by section 15(1)(g) and the sole issue left to be decided is set out in Para. 2A of the Amended Defence which is in the following terms:—

"2A. Alternatively, the defendants will contend that if, which is denied, the defendants have sublet parts of the premises at rents which (excluding any Municipal services paid by the defendants) exceed in the aggregate 110% of the recoverable rent including the apportioned rental or value of all those parts of the premises retained by the defendants or not sublet by them, then the plaintiffs are estopped from relying upon the provisions of section 15(1)(g) of the Control of Rent Ordinance. In the further alternative the plaintiffs have waived the conditions of the said section 15(1)(g) and/or acquiesced in the defendants' acceptance of rents from sub-tenants creating the conditions provided for therein and the plaintiffs are thereby precluded from recovering possession of the premises under the said Ordinance.

Particulars

On the 31st December, 1953 the defendants supplied to and at the request of the plaintiffs a statement in writing of sublettings giving particulars of occupancy including the names of the sub-tenants and the rent charged, which said statement is reproduced in the particulars of paragraph 2 of this defence. The plaintiffs, subsequently and with knowledge of the aggregate rents received by the defendants from the said sub-tenants, accepted from the defendants rent for the months of January to April 1954 inclusive."

The evidence is that the plaintiffs purchased these premises in 1951 and that at that date the defendants were already tenants holding a monthly tenancy. It is not in dispute that there was no written tenancy agreement and that the defendants were not precluded from sub-letting the whole or any part of the premises. Sometime prior to July 1953 the plaintiffs' agents Eastern Realty Co. Ltd. investigated to ascertain whether or not they could commence proceedings based on section 15(1)(g) and in the course of such investigations made enquiries from and obtained some information from sub-tenants and the defendants. These investigations according to the Secretary of the plaintiffs' agents were unsuccessful and accordingly on the instructions of the plaintiffs' agents Messrs. Laycock & Ong wrote, on behalf of the plaintiffs, a letter dated 28th July 1953 to the defendants asking for particulars of sub-lettings. This request was acceded to by the defendants through their then solicitors by a letter dated the 31st December 1953 enclosing a list containing 18 sub-tenants and the rents paid by these sub-tenants. At the bottom of this enclosed list was appended a note to the effect that the rent paid by these 18 sub-tenants included Municipal charges which were paid by the defendants.

It is not in dispute that besides these 18 sub-tenants there were 7 others who on the 31st December 1953 occupied portions of the premises. It is admitted by the defendants that these 7 others paid monthly sums to the defendants for such occupation and that up to July 1953 for such payments the defendants issued receipts stated to be for rents but that after July 1953 the defendants issued receipts stated to be for Licence Fees.

The plaintiffs terminated the defendants' tenancy on the 30th April 1954 by a Notice to

Quit dated the 29th March 1954. The Writ in this action was issued on the 10th May 1954. The managing director of the defendants in his evidence admitted that when he submitted the list of 18 sub-tenants to the plaintiffs on the 31st December 1953 he was advised that the defendant's position was safe at that date and he believed this to be so up to the date of the Notice to Quit.

I will deal first with the question of waiver. The defendants' contention is that right up to April 1954 the plaintiffs with knowledge that they could come to Court and obtain an order for possession under section 15(1)(g) had accepted rent each month up to and including the rent for April 1954 from the defendants and that by so doing they had impliedly waived the benefit conferred on them by this particular statutory provision and that as the Writ was issued in May 1954 the defendants at the date of the issue of the Writ were not in breach of section 15(1)(g) by reason of the sub-tenants' rents which were payable in arrears being due to them at the end of May 1954.

In essence the waiver relied on by the defendant is the waiver by the plaintiffs of their right to invoke the jurisdiction of the Court to make an order for possession on the ground that the tenant has brought himself within the provisions of section 15(1)(g). It is contended that the landlord with knowledge that the tenant has so brought himself within section 15(1)(g) has continued to accept rent from the tenant and by so doing has waived his right to invoke the jurisdiction of the Court down to the date of the last acceptance of rent. This contention is based on the English cases cited by Mr. Seth where the principle is laid down that acceptance of rent after knowledge of a breach of covenant or an obligation of the tenancy by the tenant amounts to a waiver of that breach.

I am unable upon authority or principle to extend the principle relied on to cover this present case. The acceptance of rent by the plaintiffs in this case where there has never been a breach of any obligation of the tenancy may well on the principle of the English cases cited amount to an affirmance of the contractual tenancy but I cannot see that by so accepting after knowledge that the defendants have brought themselves within section 15(1)(g) they can be said to have waived their right to invoke the jurisdiction of this Court to make an order for possession under section 15(1)(g).

In any event it is not in dispute that this is a case of a continuing breach of section 15(1)(g) and that therefore any waiver by acceptance of rent only binds the landlord up to the date of that acceptance and that a new breach immediately thereafter is not waived. The defendants' contention on this point is that there has been no new breach since the end of April 1954 and that when the action was commenced on the 10th May 1954 they were not in breach because rents from the sub-tenants were payable in arrears and the rents for the month of May 1954 were not due until the end of May 1954. The short answer to this contention is that there is no evidence that on the date of the commencement of this action the defendants were not entitled to receive rents from their sub-tenants at the same rate as prevailing for April 1954. From the 1st day of May 1954 the defendants had the right to receive rents from their sub-tenants. Such rents by virtue of the Apportionment Ordinance (Cap. 21) accrued due from day to day and apportionable in respect of time accordingly though not payable until the end of each calendar month.

In any event on the evidence I am of the opinion that the Secretary of the plaintiffs' agents did not know that the defendants had received rents from their sub-tenants to an extent as to bring them indisputably within section 15(1)(g). In my opinion therefore the plaintiffs had not that knowledge which is a necessary prerequisite for a case of waiver.

The other question that remains to be dealt with is that of estoppel. The defendants' contention is that the plaintiffs have by their conduct in accepting rents up to the end of April 1954 impliedly represented to the defendants as a fact that they the plaintiffs intended the tenancy to continue and that while they had a right to go to Court they did not intend to do so. By reason of this implied representation of fact the defendants were led to believe that what they were doing — receiving from their sub-tenants rents in excess of the amount permitted under section 15(1)(g) — was something to which the plaintiffs did not object. They had by reason of the plaintiffs' conduct altered this position to their detriment in that they had continued to receive rents from their sub-tenants at the end of each month thereby bringing themselves within the provisions of section 15(1)(g).

In so far as the facts are concerned the Managing Director of the defendants admitted that up to the date of the Notice to Quit he believed the defendants' position to be safe meaning thereby that they had not exceeded the limit imposed by section 15(1)(g) and that therefore he believed the plaintiffs could not successfully obtain an order for possession under section 15(1)(g). It follows therefore that on these facts, whatever the conduct of the plaintiffs in accepting rents each month from the defendants may amount to, the defendants were never induced by such conduct to alter their position to their detriment and the defence based on estoppel must accordingly fail.

In any event I agree with the contention of Counsel for the plaintiffs, relying on *Welch* v. *Nagy*[1] and *Solle* v. *Butcher*[2] that the parties cannot defeat the provisions of the Control of Rent Ordinance by estoppel.

In the result therefore the plaintiffs are entitled to an order for possession of the premises.

Order accordingly.

Solicitors: *Braddell Bros.; C. H. Koh & Co.*